Surya Holdings Limited & 2 others v CFC Stanbic Bank Limited & another (Commercial Civil Case 78 of 2014) [2021] KEHC 252 (KLR) (Commercial and Tax) (19 November 2021) (Ruling)

Neutral citation: [2021] KEHC 252 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

COMMERCIAL CIVIL CASE 78 OF 2014

DAS MAJANJA, J

NOVEMBER 19, 2021

BETWEEN

SURYA HOLDINGS LIMITED ..... 1ST PLAINTIFF

RHEA HOLDINGS LIMITED ..... 2ND PLAINTIFF

KARUTURI LIMITED ..... 3RD PLAINTIFF

AND

CFC STANBIC BANK LIMITED ..... 1ST DEFENDANT

MUNIU THOITHI & KURIA MUCHERU (JOINT RECEIVERS AND MANAGERS OF KARUTURI LIMITED) ..... 2ND DEFENDANT

RULING

1. The Plaintiffs have moved the court by the Notice of Motion dated 6th October 2021 seeking to restrain the Defendants from selling by public auction or otherwise several properties; Land Reference Numbers 12248/20, 21, 38, 2561, 2561 and 11669/2 registered in the name of the 1st Plaintiff and Land Reference Number 10854/60 (IR 87312) registered in the name of the 2nd Plaintiff together with other assets ('the suit properties") advertised for sale in the Daily Nation of 26th July 2021.

2. The application is not the first application in this matter hence it is necessary to outline the material facts. The suit properties were used to secure banking facilities amounting to USD 6,590,000.00 advanced by the 1st Defendant ("the Bank") to the 3rd Plaintiff ('the Company"). Due to default, the 3rd Plaintiff was placed under receivership on 10th February 2014. To forestall the receivership and sale of the suit properties, the Plaintiffs filed this suit on 3rd March 2014 and applied for an injunction restraining the Bank from selling the suit properties in exercise of its statutory power of sale pending the hearing and determination of the suit. They also sought to remove the receivers. Gikonyo J., considered

the application and by a ruling dated 11th June 2014, held that the receivers were properly appointed and granted an injunction restraining the Bank from selling the suit properties pending the hearing and determination of the suit. In the meantime, the Company was wound up by an order of the court on 20th March 2016 for inability to pay its debts.

3. Thereafter the Bank moved the court to enforce certain admissions of indebtedness by the Company and for the court to conduct a forensic audit of the Company's business. By a ruling dated 13th October 2016, Tuiyott J., found the that the Company had admitted owing the Bank USD 4,028,194.30 and KES. 2,706,994.13 with interest thereon prior to the receivership. The learned judge also directed that an audit of the receivership be done to establish any further amount due and owing by the 3rd Defendant.

4. The audit findings were thereafter subjected to arguments by the parties and by a ruling dated 19th January 2018 Tuiyott J., ordered as follows:

    a) It is hereby declared that the 3rd Plaintiff owes the Defendant a sum of USD 4,028,194.30 and Kshs. 2,706,994.13 together with contractual interest as contained in the facility Agreement executed between the 3rd Plaintiff and the Defendant being the pre-receivership debt.

    b) The pre-receivership debt set out above shall be paid by the 1st and 2nd Plaintiffs within sixty (60) days hereof.

    c) The 1st and 2nd Plaintiffs shall within 90 days hereof pay to the Defendant the following sums:-

        (i) USD (US Dollars) 6,337,120.48 being the sums outstanding to Creditors other than the Defendant during the receivership period.

        (ii) USD (US Dollars) 6,734,083.25 being monies advanced by the Defendant post the receivership period upto 31st December 2016.

        (iii) USD (US Dollars) 978,849.36 being expenses incurred by the Bank in preserving the Assets of the Company from 1st January 2017 to 31st July, 2017.

    d) The firm of Deloitte Consulting Limited shall undertake an immediate Audit to establish further expenses that may have been incurred in preservation of the Assets of the Company from 1st August 2017 to date and shall within 30 days hereof file the said Report for the further orders of this Court.

    e) In default of payment of the monies as set out in (a), (b) and (c) above, the orders of Injunction granted on 11thJune 2014 in favour of the Plaintiffs shall stand discharged and the Defendant shall be at liberty to exercise all or any of its rights in respect of the advances made to the 3rd Plaintiff including but not limited to the right to sell Assets covered or contained in the securities given by the Plaintiffs to the Defendant.

    f) Each party shall bear its own costs of the Application of 21st June 2016.

5. The aforesaid order precipitated an appeal; NRB CA Civil Appeal No. 114 of 2018, *Surya Holdings Limited and Others v CFC Stanbic and Another* which the court dismissed on 25th January 2019.

An attempt to appeal the judgment of the Court of Appeal to the Supreme Court was unsuccessful following the judgment dated 16th July 2021 in SCK Petition No. 8 of 2019; *Surya Holding Limited and Others v CFC Stanbic Bank Limited*. This opened the door for the Bank to proceed with sale of the suit properties.

6. The application for injunction now under consideration is supported by the affidavit of Sai Ramkrishna Karuturi, a Resident Director of the Karuturi Group which is the principal shareholder of the Plaintiffs, sworn on 5th October 2021. The application is opposed by the Bank through the affidavit of its Legal Counsel, Beryl Bango, sworn on 15th October 2021. Counsel for the Plaintiffs filed written submissions. The parties' counsel made oral submissions in support of their respective positions.

7. In the course of the proceedings, Kenya Revenue Authority filed an application dated 1st November 2021 seeking to be joined as a party to the suit. I allowed counsel for the Authority to submit on the application and reserved the decision on the matter as part of these proceedings.

8. The thrust of the application is that the intended sale of the suit property is unlawful for the following reasons set out in paragraph 5 of Mr Karuturi's affidavit and summarized as follows:The Defendants have not provided the current valuation over the suit properties despite requests by the Plaintiff's shareholders and promoters.As the 3rd Plaintiff is under liquidation and receivership, the liquidator and receiver have not complied with provisions of the *Insolvency Act*, 2015.Mr Kolluri Venkata Subarraya Kama Sustry has not received any permission from the court for the purpose of selling the Plaintiffs' assets.The acreage of the suit properties to be sold have been greatly reduced and do not reflect the accurate size of the properties on the ground.The sale is to be undertaken when there is an ongoing suit over the same properties.

9. I have considered the arguments made by counsel for the Plaintiffs and the Defendants in light of the history of the proceedings I have set out above. What is clear is that the Company is indebted and remains indebted to the Bank. There is nothing in its deposition to show that it has settled the debt or is in fact making any effort to resolve the debt. Counsel for the Plaintiffs made extensive submissions on the application of *Giella v Cassman Brown* [1973] EA 358 and that it has made out a prima facie case with a probability of success. I hold that the issue of an injunction was dealt with by Gikonyo J., in the first ruling dated 11th June 2014. The injunction was lifted by the ruling of Tuiyott J., dated 19th January 2018 which was affirmed by the Court of Appeal. In essence therefore, the right of the Bank to dispose of the suit properties remains and nothing stands in the way of the Bank exercising its statutory power of sale.

10. The Plaintiffs argue that since the Company is under liquidation, the Defendant ought to seek leave of the court before embarking on the process of sale. The Plaintiffs cited the provisions of section 228 of the *Companies Act* (Repealed) which provides that when a winding up order is made or an interim liquidator has been appointed, no action or proceedings shall proceed or commenced against the company except by leave of the court. They cite the case of *Kirtesh Premchand Shah v Trust Bank Limited* [2007] eKLR to support this proposition and also urge that the proposed sale is an "action" within the meaning of the Act.

11. From the proceedings I have set out above, it is clear that this litigation has been ongoing without any intervention by the Liquidator of the Company. This is because the Bank is a secured creditor. In fact, in *Kirtesh Premchand Shah v Trust Bank Limited* (Supra), the Court of Appeal cited with approval a passage in *Palmer's Company Law*, Vol 1 (22nd Ed.)

> " The object of the winding-up provisions of the *Companies Act* 1862", said Lindley L.J. in Re Oak Pitts Colliery Co., "....is to put all unsecured creditors upon an equality and to pay them

> pari passu." To accomplish this it was indispensable that proceedings against the company by way of action, execution, distress or other process should be suspended; otherwise the winding up would resolve itself into a scramble for the assets. [Emphasis mine]

12. As a secured creditor, the Bank is not concerned with the winding up proceedings save that any surplus will be handed over to the receiver. This point is emphasized in *Re Landmark Corporation Limited* [1968] 1 NSWR 705 cited with approval in *East Africa Cables PLC v Ecobank Kenya Limited; SBM Bank (K) Limited (interested party)* ML HC Misc. Appl. No. E043 of 2020 [2020] eKLR where the court held that:

> The law is well-settled that a receiver of the assets of a company appointed by a debenture holder is entitled to the custody and control of the assets covered by that debenture ..... This entitlement to custody and control is superior to a liquidator's statutory right and duty .... to take the company's property into his custody and under his control. The secured creditor is entitled to stand outside the winding-up and to rely on his security, including his contractual right thereunder to appoint a receiver.

13. I would also point out that in this case, it is not the Defendants who have instituted the suit. They are merely defending the claim brought by the Plaintiffs and if the Liquidator had any problem with the proceedings or action of the Bank, it would have intervened in the proceedings. In fact, the Bank doubts the capacity of Sai Ramkrishna Karuturi to agitate these proceedings not only on behalf of the Company but also of the Karuturi Group which he purports to represent and which has been wound up but I shall not comment further on this issue.

14. The Plaintiffs cannot purport to litigate on behalf of the Liquidator. The Bank is correct to state that the winding up proceeding concerning the Company are under the *Companies Act* (Repealed) and not the *Insolvency Act*, 2015 as was held Ochieng J., in a ruling dated 11th July 2016 in *Re Karuturi Limited* ML HC COMM Winding Up Cause No. 12 of 2013 [2016] eKLR. This merely fortifies the position that if the Plaintiffs or any persons are aggrieved by the action of the Liquidator or on any matter concerning the property of the Company, the proper forum for litigation is the Winding Up cause as the Liquidator and Company are subject to that jurisdiction.

15. On the issue of valuations, the Bank has disclosed that at the time this application was made, it together with the 2nd Defendants and ICICI Bank had appointed and procured a valuer who was carrying out extensive valuations of the suit properties and that all the reports have been forwarded to the Plaintiffs. These reports are annexed to the replying affidavit.

16. At any rate, I do not find this to be a reason to stop the sale of the suit properties since the Bank's right to sell has been established and affirmed by this court and the Court of Appeal. If there is an irregularity in the exercise of that power of sale, then the remedy for the aggrieved parties is an award of damages as provided in section 99(4) of the *Land Act*, 2015. It must now be clear that the Plaintiffs have not made out a case for the grant of an injunction restraining the Bank from exercising its statutory power of sale.

17. Counsel for the Kenya Revenue Authority ("KRA"), argued passionately that KRA was entitled to be admitted as an interested party to the suit in order to protect revenue. It claims KES 1,684,102,524.00 as duly assessed taxes from the Company and states that the Liquidator has admitted its proof of debt. According to the deposition of Victor Mino, an officer at KRA, sworn on 1st November 2021, the efforts to engage with the 2nd Defendant have not been fruitful. It fears that if the 2nd Defendant's action go unchecked it may lose substantial revenue.

18. The issue of joinder under Order 1 rule 1 and 3 of the Civil Procedure Rules has been considered in several cases. In *Pravin Bowry v John Ward & Another* NRB CA Civil Appeal No. 70 of 2009 [2015] eKLR the Court of Appeal adopted with approval the decision in *Departed Asians Property Custodian Board v Jaffer Brothers Ltd* [1999] 1 E.A 55 (SCU) the Supreme Court of Uganda observed that:

> A clear distinction is called for between joining a party who ought to have been joined as a defendant and one whose presence before the court is necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. A party may be joined in a suit because the party's presence is necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the cause or matter....
>
> For a person to be joined on the ground that his presence in the suit is necessary for effectual and complete settlement of all questions in the suit one of two things has to be shown. Either it has to be shown that the orders which the plaintiff seeks in the suit, would legally affect the interests of that person, and that it is desirable, for avoidance of multiplicity of suits, to have such person joined so that he is bound by the decision of the court in that suit. Alternatively, a person qualifies (on an application of a defendant) to be joined as a co-defendant, where it is shown that the defendant cannot effectually set a defence he desires to set up unless that person is joined in it, or unless the order to be made is to bind that person.

19. In *Francis Karioki Muruatetu & Another v Republic & 4 Others* SCK Petition No. 16 of 2015 [2016] eKLR, the Supreme Court stated as follows concerning joinder of interested parties:

> (i) Personal interest and/or stake that the party has in the matter must be set out in the application. The interest must be clearly identifiable and must be proximate enough to stand apart from anything that is nearly peripheral.
>
> (ii) The prejudice to be suffered by the intended interested party in case of non-joinder, must also be demonstrated to the satisfaction of the court. It must also be clearly outlined and not something remote.
>
> (iii) Lastly, a party must, in its application, set out the case and/or submissions it intends to make before the court, and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a replica of what the other parties will be making before the court.

20. KRA submits that its case is founded on the fact that it is treated as a "priority creditor" by section 34 of the *Tax Procedures Act*, 2015 ("the TPA"). Section 34(2) thereof provides that in the event of liquidation the person receiving or withholding value added tax on taxable supplies made by person registered under the Value Added Tax, 2013, excise duty payable on removal of excisable goods from the person's factory or the supply of excisable services by that person, withholding tax and a person issued with a distress notice and has an amount to pay, such amount shall not form part of the estate of the person in liquidation and shall be paid to the Commissioner before distribution.

21. A reading of section 34 aforesaid refers to liquidation hence it is clear and I agree with the submission by counsel for the Bank that the issue of the priority would only arise once collection is made by the Liquidator. This case is different; it concerns the exercise of the power of sale by a secured creditor. The property of a secured creditor is not part of the assets available for creditors in liquidation as I have stated elsewhere. It is only once the secured amount is realized and the surplus is paid out to the Liquidator

that the claim by KRA arise. The claims by KRA or any other creditor or any other interested person, should be directed to the Liquidator and any concerns raised in the Winding Up Cause.

22. Ultimately this is a suit between the Chargee and Chargor, KRA has no interest in the security held by the Bank. Its presence in this matter is not necessary for the court to effectually and completely settle all questions in this suit. Its interest is in collecting revenue from the Company which is now under liquidation and it is to liquidator that it must look to. It has more than ample tools in the TPA to achieve this purpose and none in the present suit. I therefore do not find any merit in the application.

Disposition

23. For the reasons I have set out above, I dismiss the Plaintiffs' Notice of Motion dated 6th October 2021 with costs to the 1st Defendant. I also dismiss the Notice of Motion dated 1st November 2021 by the Proposed Interested Party with costs to the 1st Defendant.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF NOVEMBER 2021.

D. S. MAJANJA

JUDGE

Court of Assistant: Mr M. Onyango

Mr Wafula instructed by Chris Davids and Company Advocates for the Plaintiffs.

Mr Ogunde instructed by Walker Kontos Advocates for the 1st Defendant.

Mr Marigi, Advocate instructed by Kenya Revenue Authority for the proposed interested party.